No. 11,040

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BENEFIT SOCIETY,

Appellant,

vs.

MAYNARD GARRISON, Insurance Commissioner of the State of California, and H. F. RISBROUGH and MAE BARR LONG, Deputy Insurance Commissioners of the State of California,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Codes, Statutes and Texts

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NATURE OF THE CASE.

This is an appeal from a decision of the United States District Court for the Southern District of California, Central Division, declaring in effect that an insurance company organized and operating in another state may not transact business in California without meeting the standards of safety prescribed by the State of California for foreign and domestic insurers, nor may their agents operate in California without securing a license designed to insure that such persons will be men of good moral character.

If appellant had been successful in the Court below, or is successful in this Court, it would mean that appellant, or any insurance organization, by the expedient of operating from another state may nullify California's insurance laws in existence for many years, and established to assure that insurers are financially able to meet their contractual obligations to insured persons in this State, and that insurance agents operating in this State are persons of decent moral character and honesty. Appellant seeks to nullify California's regulatory statutes in this regard by attempting to interpret the case of *United States v. South-Eastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, decided by the United States Supreme Court on June 5, 1944, as having the effect of voiding all such state regulatory legislation when applied to foreign companies, which legislation is enacted under the State's police power.

We believe that we can demonstrate that appellant's contention is groundless and that it cannot prevail in this appeal.

STATEMENT OF THE CASE.

The complaint in this case is in two counts. In the first cause of action appellant alleges that it is a nonprofit corporation and a mutual benefit society organized and existing under and by virtue of the laws of the State of Arizona and operating under a certificate of authority from the Arizona Corporation Commission, regularly examined by the Insurance Department, a subdivision of that Commission. It is engaged

in the business of furnishing benefits upon the deaths of its members. (Tr. Rec. p. 2.)

It alleges that its principal place of business is in the State of Arizona and it has never maintained an office or agency in the State of California, but has members in the State of California; that many of them were acquired by application through the mails from the members to the home office in Phoenix, Arizona, and that many others were acquired by contracts of assumption from California corporations; that all the applications for certificates of membership are accepted or rejected, certificates of membership issued, and premiums, dues and assessments payable at Phoenix, Arizona. (Tr. Rec. p. 3.)

The complaint in a limited manner sets up the activities of appellant as regards the State of California. It alleges that the appellant has received inquiries from California residents in regard to "its insurance policies or benefit certificates" and has sent its representatives or agents, also members of the society, "to call upon persons making inquiries"; that applications have been signed by California residents and then forwarded to the home office in Phoenix, Arizona, for rejection or acceptance. In the latter case the policies are issued in Phoenix, Arizona, and mailed directly to the insured with notice to pay all premiums at the home office. (Tr. Rec. p. 4.)

Then follows a factual recitation concerning the defendant O'Lein, which resulted in a warrant of arrest being issued against "its representative" charging the selling of insurance in the State of California

without a license and aiding a non-admitted insurance company to transact insurance in California. The complaint then alleges that defendant Maynard Garrison, acting through his deputies, "in violation of the commerce clause of the Constitution of the United States and repugnant to the Fourteenth Amendment", "has interfered with said representatives and has threatened them with prosecution if they persisted in aiding in such transactions". Then follows names of persons "who have been ordered by the said defendant" not to assist "in such transactions for plaintiff". No dates or circumstances are given. (Tr. Rec. p. 5.)

The complaint alleges that, "the said transactions constitute interstate commerce and the assistance rendered by the agents is but one step in a chain of events constituting an interstate transaction". (Tr. Rec. p. 5.) It claims past interference with its representatives and threats of future interference, and alleges that appellant has and will suffer great and irreparable injury, that pecuniary compensation will not afford adequate relief, and that there is no speedy or adequate remedy at law if separate actions must be brought by its agents. (Tr. Rec. p. 5.)

The complaint then alleges that appellant is qualified to do a life insurance business in Arizona, but there is no provision for the admission of such company in California; that only foreign companies transacting life insurance business on the legal reserve basis or fraternal basis can be so qualified; that California has not regulated such business, but excludes foreign companies while regulating local companies

transacting that business, and that, therefore, appellees discriminate against appellant and interfere with its interstate commerce. (Tr. Rec. p. 6.)

The second cause of action incorporates all of the allegations of the first cause of action and in addition alleges that appellees advised members of appellant to sever their connections with appellant company and forfeit their certificates; that they were "illegal" and "not worth the paper they are written on", and that appellees continued a campaign of "molestation and interference" with appellant's members; that in 1936 an action was filed against the then Insurance Commissioner of California and several of his deputies seeking an injunction "against such acts" in the District Court of the United States for the Southern District of California, Central Division, and that after trial the Court found that defendants had made the statements, but not since September 10, 1936; that the Insurance Commissioner and his deputies in that action had not threatened to resume the writing of letters, and that this appellant had not been damaged to the extent of $3000.00, and that, therefore, the Court dismissed that action for lack of jurisdiction. (Tr. Rec. p. 7.)

The complaint next alleges that the appellees, the Insurance Commissioner and his deputies, have continued to interfere with appellant's members and have written letters to named persons, "disturbing the same members and inferring to them that they could not collect on plaintiff's policies in case of loss"; that on September 16, 1941, a deputy wrote to a Mr. Plummer as follows:

> "The First National Benefit Society has tried to get into California through both the Insurance Department and the Federal Courts and has been repulsed each time. Any insurance transaction by any person other than a certificate holder taking place within this State on behalf of that organization is unlawful." (Tr. Rec. p. 8.)

Appellant then alleged that appellees have "written and verbally counseled", upon many occasions, "said members to drop their certificates in the society" and continued to interfere with appellant's members in California, with the intention and purpose of injuring and destroying the business of appellant, and that the acts have damaged appellant in excess of three thousand dollars. No circumstances of the purported acts are set forth in the complaint. It is alleged that the statements are untrue and that appellant's certificates are legal and valuable, and that irreparable injury will result by weakening and impairing the existence of appellant. The next allegation is that appellees have advised members to drop their insurance and insure with a California corporation, and cites one letter purported to be written in 1937, reading in part:

> "If you are interested in securing insurance which will guarantee the payment of your funeral expenses, etc., we would suggest that there are any number of insurance companies which are qualified to operate in this State."

The complaint next alleges the number and amount of death claims paid by the company during the past

ten years, and the number of outstanding certificates; that many Arizona people who removed to California were advised by appellees to drop their certificates because they were unlawful and illegal in California, but no instances of the latter are set forth. It is alleged that appellant has lost ten thousand of its California members, involving an annual dues loss of two hundred forty thousand dollars and, based upon the average expectancy of time which such certificates remain in force, it has already been damaged in the sum of one million two hundred thousand dollars. The prayer is for an injunction and for damages in the sum of one million two hundred thousand dollars.

We believe the above to be a full and accurate synopsis of the allegations of the complaint. The defendant Alvin J. O'Lein, sued individually, has been voluntarily dismissed from the case.

The appellees filed in the lower Court, not as individuals for they are not sued as individuals but in their legal capacities, a motion to dismiss or a motion for more definite statement (Tr. Rec. pp. 13-18), together with points and authorities. Appellant filed points and authorities in opposition to the motion, the matter was argued in briefs, and a judgment of dismissal ordered by the Court and filed therein. (Tr. Rec. p. 19.) The District Court thereupon rendered and filed an exhaustive opinion (Tr. Rec. pp. 20-63), judgment was entered dismissing the action (Tr. Rec. p. 64), and an appeal taken to this Court.

STATUTES INVOLVED.

Appellant describes itself in the complaint as a nonprofit corporation and mutual benefit society in the business of furnishing benefits upon deaths of its members. (Tr. Rec. p. 2.) In its points and authorities in opposition to defendants' motion to dismiss; or motion for more definite statement filed in the Court below, appellant states that, "Chapter 9 of the California Insurance Code, being sections 10810 to 10940, provide for California companies on a stipulated premium plan and are similar to the plan of plaintiff".

California Insurance Code, section 10810 reads as follows:

> "Every contract whereby a benefit is to accrue to a person named therein through the death of the insured, or his physical disability from accident or sickness, or for the payment of any sum of money as an annuity or endowment, if the benefit is conditioned, not upon fixed payments but upon the collection from time to time of stipulated premiums with provision requiring additional payments from insured members by assessment, shall be a contract of mutual insurance on the stipulated premium plan; and the business involving the issuance of such contracts shall be carried on in this State only by duly organized corporations subject to this chapter."

California Insurance Code, section 10818 reads:

> "On and after January 1, 1940, no new insurer may be organized or admitted to operate under this chapter. Nothing herein contained shall pro-

hibit an insurer theretofore existing under or by virtue of this chapter from transforming to an insurer operating under the provisions of Chapter 9a of this part nor shall anything herein contained prohibit an association now operating under Chapter 8 of this part from transforming to an insurer operating under this chapter at times and in the manner provided in Chapter 8. Any corporation formed pursuant to Section 10815, which, prior to January 1, 1940, exhibits proof satisfactory to the commissioner that it has procured 100 subscribers or applicants who have each paid the required initial premium, and which also deposits with the commissioner on or before January 1, 1940, the sum of one thousand dollars ($1,000) as a payment on its statutory deposit, may be admitted on completion of its organization and statutory deposit on or before July 1, 1940."

The plan of operation of appellant, which is issuing death benefit certificates under a stipulated premium plan with a right of assessment against certificate holders, was permitted in California, both as to foreign and domestic insurers, prior to 1940. (California Statutes 1935, Chapter 282.) Under the provisions of California Statutes 1939, Chapter 327, such companies licensed to do business in California prior to 1940 were and are permitted to continue in business in this State, but section 10818 of the Insurance Code of California forbids any new insurers to be organized or admitted under that chapter on or after January 1, 1940, whether a foreign or domestic company, with certain exceptions not here material.

There is no bar on foreign companies or on appellant from transacting insurance in California if they meet California standards and secure a certificate of authority from the Insurance Commissioner. However, section 700 of the California Insurance Code provides:

> "A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. After such issue the holder shall continue to comply with the requirements as to its business set forth in this code and in the laws of this State."

Section 703 of the California Insurance Code reads:

> "Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:
>
> "(a) Acting as agents for a nonadmitted insurer in the transaction of insurance business in this State.
>
> "(b) In any manner advertising a nonadmitted insurer in this State.
>
> "(c) In any other manner aiding a nonadmitted insurer to transact insurance business in this State.
>
> "In addition to any penalty provided for commission of misdemeanors, a person violating any provision of this section shall forfeit to this State

> the sum of five hundred dollars ($500), together with one hundred dollars ($100) for each month or fraction thereof during which he continues such violation."

If appellant desires to transact life insurance in California, provision is made therefor, applicable alike to foreign and domestic insurers, in California Insurance Code, section 10510, providing for the issuance of licenses to do business in California, as follows:

> "An incorporated life insurer issuing policies on the reserve basis shall not transact life insurance in this State unless it has a paid-in capital of at least two hundred thousand dollars ($200,000)."

In other words, California statutes provide that foreign or domestic companies cannot now do a life insurance business except on a legal reserve basis and there are no exceptions, whether foreign or domestic companies, except as to companies existing and doing business in California prior to the enactment of the present laws. The policy behind these statutes is that experience has shown that without such reserves and surpluses, a mutual company doing business on the stipulated premium plan, with right of assessment, is not adequately safeguarded to insure that money will be available to pay death benefits. However, California permits such companies, foreign or domestic, without discrimination, operating in California prior to January 1, 1940, to continue in business in order to protect contracts written prior to that date.

Therefore, the effectiveness of these statutes, both as they affect appellant company and its agents, is before this Court.

OUTLINE OF ARGUMENT.

Argument:

I. The holding of the Supreme Court in *United States v. South-Eastern Underwriters Association* does not void State regulatory laws.

II. California statutes regulating and controlling insurance companies and their agents operating in California are a proper exercise of the State's police power.

III. California's regulatory statutes do not discriminate between foreign and domestic insurance companies or their agents.

IV. The Commerce Clause of the United States Constitution does not bar a state from adopting regulatory measures in the exercise of its police power.

V. Congress has now approved State regulation of foreign insurance companies.

VI. Appellees are entitled to a dismissal of this action under the Eleventh Amendment to the Constitution.

ARGUMENT.

I.

THE HOLDING OF THE SUPREME COURT IN UNITED STATES v. SOUTH-EASTERN UNDERWRITERS ASSOCIATION DOES NOT VOID STATE REGULATORY LAWS.

The principal contention of appellant in this case is that because of the decision of the *United States v. South-Eastern Underwriters Assn.,* 64 S. Ct. 1162, 322 U. S. 533, 88 L. Ed. 1082, California regulatory statutes do not apply to appellant or its agents even though Congress has not legislated upon the subject, and that the police power of the State has now become of no effect. We submit that the recent decision of the Supreme Court warrants no such assumption.

The Supreme Court first reviewed the question of state control over the business of insurance in the early case of *Paul v. Virginia,* 8 Wall. 168, decided in 1868. It was there decided that a Virginia statute forbidding any foreign insurance company from doing business in Virginia without first obtaining a license and meeting State conditions was constitutional. The statute was questioned on the ground that it interfered with interstate commerce, which field was left to Congress. The Court upheld the statute, holding that the business of insurance did not constitute interstate commerce even though it crossed State lines. Subsequently that Court upheld this view in a number of cases.

Ducat v. Chicago, 10 Wall. 410;

Liverpool Insurance Co. v. Massachusetts, 10 Wall. 566;

Philadelphia Fire Association v. New York, 119 U. S. 110;
Hooper v. California, 155 U. S. 648;
Noble v. Mitchell, 164 U. S. 367;
New York Life Insurance Co. v. Cravens, 178 U. S. 389;
Bothwell v. Buckbee-Mears, 275 U. S. 274;
New York Life Insurance Company v. Deer Lodge County, 231 U. S. 495.

On June 5, 1944, the Supreme Court in the *Underwriters* case reversed a finding of *Paul v. Virginia* by holding that insurance is commerce and when transacted across State lines constitutes interstate commerce, making applicable the Sherman Anti-Trust Act. It did not, however, as contended by appellant (App's. Op. Br. p. 18), otherwise reverse the case. In fact, in the recent case of *Lincoln National Insurance Co. v. Read,* 65 S. Ct., p. 1220, it is cited as authority in a case which did not involve the commerce question. In the 1944 decision the majority opinion was careful to limit the effect thereof solely to the applicability of the Sherman Anti-Trust Act to insurance business (pp. 538-539):

> "The record, then, presents two questions and no others: (1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute 'Commerce among the several States' so as to make them subject to regulation by Congress under the Commerce Clause? Since it is

> our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question."

More particularly the Court was cognizant of the fact that attempts might be made to distort the finding of the Court into a holding that State regulation of foreign insurance companies doing business within its borders violated the Commerce Clause of the Constitution, and to forestall such an interpretation Mr. Justice Black, who wrote the majority opinion of the Court, said (pp. 1170-1171):

> "Another reason advanced to support the result of the cases which follows *Paul v. Virginia* has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid'. Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the States. In marking out these activities the primary test applied by the Court is not the mechanical one of

> whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

Thus Mr. Justice Black was aware of local regulatory laws and was careful to distinguish their integrity.

The opinion of the Court further states (p. 1169):

> "To uphold insurance laws of other states, including tax laws, Paul v. Virginia's generalization and reasoning have been consistently adhered to."

He is stating that he sees no reason why such state statutes should not continue to be upheld.

He further describes the nature of the problem before the Court in the *South-Eastern Underwriters Assn.* case as contrasted with problems at issue where validity of state statutes are questioned at page 1169:

> "Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great

> business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause. Furthermore, the reasons given in support of the generalization that 'the business of insurance is not commerce' and can never be conducted so as to constitute 'Commerce among the States' are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause."

He is saying that when the result of judicial action will be to narrow the scope of the federal power to regulate business carried on across state lines and the precise issue before the Court is not the validity of a state statute which already regulates that business, he will hesitate to void an act of Congress which appears applicable.

He further indicates a willingness to uphold state regulatory legislation as applied to the insurance business when he states (p. 1178):

> "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated."

These expressed views clearly demonstrate that the majority justices were fully aware that their discussion in that case would encourage cases just like this case now before the Court. As such, the Court, through Mr. Justice Black, went out of its way to indicate that the *South-Eastern Underwriters Assn.*

case was not to be used as authority to declare state regulatory statutes unconstitutional as an unlawful interference with interstate commerce.

Likewise the Supreme Court in *Polish National Alliance of the United States of North America v. National Labor Relations Board,* 64 S. Ct. 196, 88 Law. Ed. 1117, decided also on June 5, 1944, by the Supreme Court, in holding a fraternal benefit society providing death, disability and accident benefits to its members and their beneficiaries, when doing business over state lines, was subject to the National Labor Relations Act, did not hold insurance companies relieved from state regulatory acts. In fact we again find the Supreme Court, this time speaking through Mr. Justice Frankfurter, advising that even though insurance be deemed interstate commerce when conducted over state lines, yet state regulatory and even tax statutes continue to be valid when not superseded by federal legislation. On page 1199 of the decision it is stated:

> "In this aspect, the case we have before us presents a wholly new problem of the relation of federal authority to the business of insurance. The long series of insurance cases that have come to this Court for more than seventy-five years, from Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, to New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332, have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate com-

merce and that, since the business of insurance is in effect merely a congeries of contracts, the States may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it."

Comment of eminent authority is pertinent and shows ample authority for the view that the *South-Eastern Underwriters* case does not invalidate state regulatory laws enacted under the police power when not discriminatory in nature.

In 1944 Columbia Law Review, pp. 775-777, it is stated with regard to the Supreme Court decision:

"All the Justices showed great concern over the practical effects of the instant decision. The dissenting opinions, especially, put overwhelming stress upon the danger that the outlawing of a considerable segment of state legislation will bring confusion into the field of insurance. The majority regarded these apprehensions as greatly exaggerated, and this view seems well supported by the prevailing law. The early notion that interstate commerce is, by virtue of the commerce clause itself, exempt from state regulation was long ago abandoned. Nor is it any longer true that Congress, by the regulation of merely one aspect of an interstate business, is presumed to have occupied the entire field or to have mani-

> fested its intention that federal legislation be 'the full measure of regulation and (that) outside of it activity is to be free'."

Regardless of whatever doubt the decision may have created with respect to continued regulation by the states of insurance companies engaged in interstate commerce, that doubt has been dispelled by the enactment by the Seventy-Ninth Congress of Public Law 15 (Ch. 20; s. 340), effective March 9, 1945, entitled, "An act to express the intent of Congress with reference to the regulation of the business of insurance". This act, discussed later herein, clearly declares the policy of the Federal Government to leave regulation of insurance companies to the several states wherein they operate and that silence on the part of Congress is not to be deemed a bar to State regulation.

II.

CALIFORNIA STATUTES REGULATING AND CONTROLLING INSURANCE COMPANIES AND THEIR AGENTS OPERATING IN CALIFORNIA ARE A PROPER EXERCISE OF THE STATE'S POLICE POWER.

State laws regulating insurance companies, both foreign and domestic, have uniformly been upheld as a proper exercise of the police power of the State. Thus, in speaking of a State statute regulating insurance rates, the Supreme Court stated in *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, at p. 412, as follows:

"Those regulations exhibit it to be the conception of the law making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. * * * The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country; the disaster to the individual is shared by many, the disaster to a community shared by other communities; * * *

"Their (i.e. insurance companies) efficiency, therefore, and solvency are of great concern. * * * We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effects stop with the individuals.

(p. 415) "And both by the expression of the principal and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest' and therefore subject 'to be controlled by the public for the common good.' "

In *National Union F. Ins. Co. v. Wanberg,* 260 U. S. 71, the Court concisely stated at page 73:

"The decision of this court in *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, settled the

> right of a state legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest."

In *Osborn v. Ozlin,* 310 U. S. 53, the Court construed a statute of the State of Virginia which in effect forbade certain contracts of insurance by companies authorized to do business in the State "except through regularly constituted and registered resident agents or agencies of such companies." The Virginia "counter-signature" statute further provided that such resident agents "shall be entitled to and shall receive the usual and customary commissions allowed on such contracts," and may not share more than one-half of this commission with a non-resident broker.

The statute was attacked as violative of the Fourteenth Amendment by foreign corporations authorized to do business in the State and by some of their salaried employees. In holding the statute to be a valid exercise of the State's police power, the Court said, at pages 65-66:

> "* * * Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudees of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, *German Alliance Ins. Co. v. Lewis,* 233 US 389; it may regulate the compensation of agents, *O'Gorman & Young v. Hartford F. Ins. Co.,* 282 US 251; it may curtail drastically the area of free contract, *National Union F. Ins. Co. v. Wan-*

berg, 260 US 71. States have controlled the expenses of insurance companies, *New York Insurance Law,* Consolidated Laws of New York, chap. 28, §244, and Wisconsin Statutes, §201.21; and see Report of Joint (Armstrong) Insurance Investigation Committee (NY) pp. 403-418 (1906). They have also promoted insurance through savings banks; see Berman, The Massachusetts System of Savings Bank Life Insurance, Bulletin No. 615, U. S. Bureau of Labor Statistics, and New York Laws of 1938, chap. 471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, *Green v. Frazier,* 253 US 233, or might take 'the whole business of banking under its control,' *Noble State Bank v. Haskell,* 219 US 104, 113. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. *LaTourette v. McMaster* 248 US 465. All these are questions of policy not for us to judge. * * * The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

And again at pages 62-3:

"In affecting the cost of these master policies, say the appellants, Virginia is intruding upon business transactions beyond its borders. Not

only is a licensed company forbidden to write insurance except through a resident agent, but the agent cannot retain less than one-half of the customary commission allowed on such a contract for what may, so far as the requirements of the law are concerned, be no more than the perfunctory service of countersigning the policy.

"But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Asso. v. Industrial Acci. Commission,* 294 US 532; *Great Atlantic & P. Tea Co. v. Grosjean,* 301 US 412, Compare *Equitable Life Assur. Soc. v. Pennsylvania,* 238 US 143."

In *LaTourette v. McMaster,* 248 U. S. 465, the Court upheld the validity of a state statute which provided for the licensing of insurance brokers, and providing further that licenses could only be issued to residents of the State. At pages 467-468 the Court said:

"1. This contention depends upon the character of the business of insurance, and it was decided in *German Alliance Insurance Co. v. Lewis,* 233 U.S. 389, to be clothed with a public interest and subject, therefore, to the regulating power of the state. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consumma-

tion are affected with the same interest and subject to regulation as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer (*Hooper v. California,* 155 U. S. 648, 657), and his fidelity to both may be the concern of the state to secure. As said by the Supreme Court of the State:

"'It is important for the protection of the interests of the people of the State that the business should be in the hands of competent and trustworthy persons,' and we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the commissioner of insurance. The motive of the statute, therefore, is benefit to insurer and insured and the means it provides seem to be appropriate.

"'But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise.' It is enough if the legislation be passed in the exercise of a power of government and has relation to that power."

It is significant that the above cases, to which may be added many others, and in particular the recent case (March, 1943) of *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, written by Mr. Justice Black, the author of the majority opinion in the *South-Eastern Underwriters* case, were not based upon any finding that the business of insurance constituted inter-

state commerce, but rather upon the power in the states to protect their citizens from insolvency, dishonesty and other evils which may occur in the business of insurance if not adequately regulated.

The fact that the Supreme Court has now held that insurance may be considered interstate for the purpose of prosecution under the Sherman Anti-Trust Act does not reverse this list of cases.

The Court did not say that states no longer have power to regulate insurance companies and their agents within the State by means of licenses, particularly where as here there exists no legislation by Congress, and where as here Congress in effect, by the adoption of Public Law 15, has approved state legislation. The chaotic condition which would result from any other interpretation is unthinkable.

This Court had before it the effect of the *South-Eastern Underwriters* case in *Ware v. Travelers Ins. Co.,* No. 10,881, decided June 29, 1945, in holding Idaho's resident agent law constitutional. This Court recognized that state regulatory laws enacted in furtherance of local welfare remain in effect. The California statutes in question are no different in basic purpose.

III.

CALIFORNIA'S REGULATORY STATUTES DO NOT DISCRIMINATE BETWEEN FOREIGN AND DOMESTIC INSURANCE COMPANIES OR THEIR AGENTS.

Appellees have under the title of this brief headed "Statutes Involved" (supra) set forth what are believed to be the controlling statutes and have noted that no discrimination is made between foreign and domestic insurers or their agents. In fact these key sections make no particular reference to a distinction between domestic and foreign insurance companies or their agents. In fact these key sections make no particular reference to a distinction between domestic and foreign insurance companies or their agents, but merely set up regulations applicable to all. Therefore, from the very terms of the statutes, no discrimination can be found. The Legislature controls and regulates domestic insurers for the protection of the people of the State and foreign companies are made subject to the same regulations.

In *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, the Supreme Court said through Mr. Justice Black, on March 1, 1943 (p. 320):

> "These regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside of the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its

> headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business. The appellants can not, 'by spreading their business and activities over other states * * * set at naught the public policy' of *New York, Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412, 427. Whereas here the state has full power to prescribe the forms of contract, the terms of protection of the insured, and the type of reserve funds needed, 'the mere fact that state action may have repercussions beyond state lines is of no judicial significance.' *Osborn v. Ozlin,* supra, at 62. Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places. *Alaska Packers Association v. Industrial Accident Commission,* supra. We think the regulations themselves, since they are aimed at the protection of the solvency of the reciprocals or at promoting the convenience with which New York residents may do their insurance business, are all within the scope of state power. *Osborn v. Ozlin,* supra, at 65, 66."

Appellant seeks in effect to cause an interpretation which will result in it as a foreign company having an advantage over domestic companies. Certainly if California regulatory statutes are binding on domestic companies, but foreign companies and their agents may operate in this State with impunity, then there is discrimination, but in favor of appellant.

Appellant argues (App's. Op. Br., p. 31) that the question is whether California may "reach out across

its State lines and regulate the corporate structure, the actuarial standard, and even the bookkeeping basis, as well as complete regulation of such foreign company's business in every state in the Union for the privilege of transacting an insurance business with the citizens of California. * * *"

Such an argument hardly needs an answer. California does not seek any control over appellant, but if appellant desires to do business in California, then it must meet California standards adopted for the protection of its citizens. Whether appellant desires to comply is strictly up to it to decide.

That California neither discriminates against foreign companies nor seeks to control them appears obvious. A similar contention was made in the very recent case of *State Farm Mutual Auto. Ins. Co. v. Duel,* 65 S. Ct. 573, 324 U. S. 154, decided February 12, 1945. In that case a Wisconsin statute requiring certain reserves of insurance companies was upheld against a claim that it violated the due process clause of the United States Constitution. In disposing of the contention the Court said (p. 576):

> "Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens. * * * We cannot say that the reserve required by Wisconsin has any purpose but the protection of its own citizens. Its adequacy or appropriateness as a standard for qualification to do business in Wisconsin is, therefore, a question for Wisconsin to determine."

There appears no reason why this logic, applied under the due process clause, should not have equal force under the commerce clause for if this subject is a matter of local concern under one clause of the Constitution, it must be likewise so under the other.

IV.

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT BAR A STATE FROM ADOPTING REGULATORY MEASURES IN THE EXERCISE OF ITS POLICE POWER.

The case at bar involves a consideration of a police power exercised by a state and the Commerce Clause of the Federal Constitution. In this field there are, of course, innumerable cases from which certain definite rulings can be deducted. Many of these conclusions are set forth in the opinion of the Court below in the form of nine postulates. (Tr. Rec. pp. 41-46).

Professor Willis in his standard work, "Constitutional Law of the United States", divides the decisions of the Supreme Court of the United States on the question of who may regulate interstate commerce as between the Federal Government and the State into three periods. In the first period, being before the year 1851, the Supreme Court took the position that the power to regulate interstate commerce was a concurrent power of the Federal Government and the States. The exception, Professor Willis points out, was in *Gibbons v. Ogden* (1824), 9 Wheat. 1, when "Chief Justice Marshall almost took the posi-

tion that the power of the Federal Government was an exclusive power." (See p. 307, Willis—Constitutional Law of the United States.) The second period was between 1851 and 1894 when the view of the Supreme Court was, "that where the matter was national in scope and needed one uniform method of regulation, the federal government's power was an exclusive power, but that in other cases the power to regulate interstate commerce continued to be a concurrent power." The third period came after 1894. The Supreme Court since that date, says Professor Willis, has continued to hold that where the matter was not national in scope, the power to regulate interstate commerce was concurrent, but also that where the federal government's power was exclusive, the states have a general indirect or incidental police power. This resulted in the present doctrine that where the states have a concurrent power or even a general police power, after the Federal Government have exercised its specific police power, the Federal power will supersede any power which the states might otherwise have, and conversely in absence of the exercise of Federal power, the state's police power will be upheld. The latter situation is present in this case.

When applying these general principles, it appears that the Courts have attempted in individual cases to reconcile the police power of the states and the Commerce Clause of the Federal Constitution for the public good, or, as stated in *Parker v. Brown,* 317 U. S.

341, at p. 362, "an accommodation of the competing demands of the state and national interests involved."

The broad question as to whether the constitutional power delegated by the states to Congress to regulate interstate commerce precludes the sovereign states from enacting under their police power legislation which in some way affects interstate commerce was presented to the Supreme Court of the United States in the case of *Cooley v. The Board of Wardens of the Port of Philadelphia, etc.,* 12 Howard 298, 53 U. S. 298 (1851), which involved a statute of the State of Pennsylvania requiring every ship arriving at or leaving the Port of Philadelphia to take aboard a local pilot. This State regulation was attacked as unconstitutional on the ground that it was an attempted regulation of a phase of interstate or foreign commerce and that the power to regulate such commerce was vested exclusively in the Congress of the United States.

As a preliminary step in determining the constitutionality of the statute, the Court found, first that the provisions concerning pilots "do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution," (p. 316) and "that a regulation of pilots is a regulation of commerce, within the grant to Congress of the Commercial power, contained in the third clause of the eighth section of the first article of the Constitution." (p. 317.)

The Court, notwithstanding, upheld the constitutionality of the state statute. It determined that the delegation of the power to Congress to deal with interstate commerce did not exclude the states from exercising any authority over the same subject. The Court made a sharp distinction between those phases of interstate commerce which require a single national uniform system or rule and those which are necessarily local in nature and can best or most advantageously be provided for by different systems enacted by the separate states. The Court said at pages 317-318:

> "* * * Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the states of all power to regulate pilots. * * * The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words has been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Con-

gress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. (Citing cases.)

"* * * Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

"* * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. * * *"

Many cases were subsequently determined using the above rule and were collated by the Supreme

Court in *Simpson v. Shepard* (Minnesota Rate Cases), 230 U. S. 352. In the latter case the Court said:

> "The grant in the Constitution of its own force, that is, without action by Congress established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. (Citing cases.) (pp. 399-400.)
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> "But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which

nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of na-

tional need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. (pp. 402-403.)

* * * * * * *

"State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirements, and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export, or by including incidentally those brought into the state and held for sale in the original imported packages." (Citing cases.) (p. 408.)

In recent years the Supreme Court has been even more liberal in giving effect to the State's police power affecting interstate commerce when Congress has not acted. In *Bradley v. Public Utilities Commission of Ohio,* 289 U. S. 92, the Court said at page 95:

"* * * Regulation to ensure safety is an exercise of the police power. It is primarily a state function, whether the *locus* be private property or the public highways. Congress has not dealt with the subject. Hence, even where the motor cars are used exclusively in interstate commerce, a State may freely exact registration of the vehicle and an operator's license, Hendrick v. Maryland, 235 U. S. 610, 622; Clark v. Poor, 274 U. S. 554, 557; Sprout v. South Bend, 277 U. S. 163, 169; may require the appointment of an agent upon whom process can be served in an action arising out of operation of the vehicle within the State, Kane v. New Jersey, 242 U. S.

160; Hess v. Pawloski, 274 U. S. 352, 356; and may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. Continental Baking Co. v. Woodring, 286 U. S. 352, 365-366. Compare Packard v. Banton, 264 U. S. 140; Sprout v. South Bend, 277 U. S. 163, 171-172; Hodge Co. v. Cincinnati, 284 U. S. 335, 337. The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety, Morris v. Duby, 274 U. S. 135, 144; Sproles v. Binford, 286 U. S. 374, 389-390. Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety. Compare Hammond v. Schappi Bus Line, 275 U. S. 164, 170-171."

In *South Carolina Highway Department v. Barnwell Bros. Inc.,* 303 U. S. 177, the Court upheld the constitutionality of a state statute which prohibited the use on state highways of trucks in excess of determined widths and weights. The Court denied a contention that these restrictions imposed an unconstitutional burden upon interstate commerce, stating at page 188:

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a

legislative authority, which, under the Constitution, has been left to the states.

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause, Const. art. 1, § 8, cl. 3, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (Citing cases.)

Other cases holding similarly are *Milk Control Board v. Eisenberg Farm Products,* 306 U. S. 346, upholding a state statute defining a milk dealer as any person who purchases or handles milk within the State for sale, shipment, storage, purchase or manufacture within or without the State and creating a Milk Control Board with power to supervise and regulate the industry. The statute required a dealer to obtain a license and file a bond. The Board was

authorized to fix minimum prices. The milk dealer in question claimed that it could do business within the State without complying with the statute because it was engaged in interstate commerce and that the legislation as to such dealer was an unconstitutional burden on interstate commerce. The Court upheld the validity of the statute as a proper exercise of the police power of the State.

In the recent case of *Parker v. Brown,* 317 U. S. 341 the Court upheld the constitutionality of the California State marketing program affecting the raisin industry, 95% of which crop goes into interstate commerce. The Court upheld the statute, saying at pages 362-363:

> "* * * When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. (Citing cases.)
>
> "Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', see DiSanto v. Pennsylvania, supra; cf. Wickard v. Filburn, supra, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the in-

terest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause."

In *Union Brokerage Company v. Jensen,* 322 U. S. 202, the Court upheld the validity of a state statute denying recourse to the State Courts to any foreign corporation which did business in the State without first paying a license fee. The appellant was a foreign corporation engaged in foreign or interstate commerce. The Court said, at pages 210-211:

"We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances."

Many additional cases could be cited in point, of which the following are but a few:

Hartford Accident & Indemnity Co. v. Illinois, 298 U. S. 155 (upholding a state statute requiring commission merchants selling in the State to be licensed when handling products from out of State);

Duckworth v. State of Arkansas, 314 U. S. 390;

Bradley v. Public Utilities Com. of Ohio, 289 U. S. 92;

Terminal R.R. Assn. v. Trainmen, 318 U. S. 1 (State law requiring railroads to provide cabooses);

Kelly v. Washington, 302 U. S. 1 (State law providing inspection of tugs admittedly engaged in interstate commerce).

Illustrative of the extent to which the Supreme Court has gone in upholding the States' police power even outside the field of interstate commerce are the cases upholding State laws prohibiting branch banking as applied to national banks. Thus we find that national banks created and existing by virtue of federal legislation may not operate branch banks in a state where there is a prohibitory state statute. National banks are creatures of federal law and yet, in the absence of conflicting federal statutes, local laws in this respect have been upheld. Cases in this field are: *First National Bank v. Missouri,* 263 U. S. 640, and *Lewis v. Fidelity and Deposit Company,* 292 U. S. 559.

The above principles are not overruled by the Court in the *South-Eastern* case, but repeated therein, for in that case the Court said (p. 1171):

"In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

The provisions of California's regulatory statutes may have an incidental effect on interstate commerce, but only to a degree which is far overshadowed by the necessity of such regulations for the protection of residents of this State. Foreign companies and their agents are not prevented from doing business in California, but are merely required to abide by the same rules and regulations as applied to local companies and their agents. Such laws are constitutional and as stated in *Union Brokerage Company v. Jensen,* supra, decided on May 8, 1944, in commenting on the Commerce Clause at page 212:

"Nor does it preclude a state from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union

the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporations Act, Iowa offended neither Federal legislation nor the Commerce Clause."

V.

CONGRESS HAS NOW APPROVED STATE REGULATION OF FOREIGN INSURANCE COMPANIES.

On March 9, 1945, the Congress of the United States approved Public Law 15 of the Seventy-ninth Congress. This law was, therefore, passed after the decision in *United States v. South-Eastern Underwriters Assn.* and the institution of the case at bar. It is a clear expression by Congress of its recognition of the need for State regulation of foreign insurance companies doing business within their borders and of an intention that the States, rather than Congress, shall so regulate.

Public Law No. 15 reads:

"An Act

"To express the intent of the Congress with reference to the regulation of the business of insurance.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence

on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"Sec. 4. Nothing contained in this Act shal be construed to affect in any manner the appli cation to the business of insurance of the Act o July 5, 1935, as amended, known as the Nationa Labor Relations Act, or the Act of June 25, 193 as amended, known as the Fair Labor Standard Act of 1938, or the Act of June 5, 1920, know as the Merchant Marine Act, 1920.

"Sec. 5. As used in this Act, the term 'State includes the several States, Alaska, Hawai Puerto Rico, and the District of Columbia.

"Sec. 6. If any provision of this Act, or th application of such provision to any person o circumstances, shall be held invalid, the re mainder of the Act, and the application of suc provision to persons or circumstances other tha those as to which it is held invalid, shall not b affected."

There is ample precedent for congressional consen to State action in lieu of congressional control in th field of regulation, which has received judicial sanc tion. Thus the Wilson Act was passed in 1890 an upheld in *In re Rahrer,* 140 U. S. 545. In 1913 th Webb-Kenyon Act was enacted to give effect to Stat laws by divesting liquor of its interstate commerc character under certain circumstances, and this Ac was upheld in *Clark Distilling Co. v. Western Mary land R.R. Co.,* 242 U. S. 311 (1917). The Hawes Cooper Act (1929) and the Ashurst-Summers Ac (1935) were adopted to permit State control of con vict-made goods passing in interstate commerce an were given effect in *Whitfield v. Ohio,* 297 U. S. 431 and *Kentucky Whip & Collar Co. v. Illinois Centra*

R. Co., 299 U. S. 334. The Federal Power Act of 935 falls in the same category. It was given effect *Safe Harbor Water Power Corp. v. Federal Power ommission,* 124 Fed. (2d) 800.

Public Law 15, therefore, accomplishes two things. t affirmatively sets forth the Congressional intent at State regulatory statutes shall be given effect d that Congress does not intend to otherwise regute insurance business and, secondly, under the cases st cited it permits the Courts to uphold state regutory statutes.

It is true, of course, that Public Law 15 was ented after the institution of this case. However, apellant seeks an injunction prohibiting the enforcement of California regulatory acts. It is a fundaental rule that the Court will not permit an idle t if, as is contended, Public Law 15 removes any estion as to the effectiveness of California's laws. n injunction would constitute an idle act which the ourt will not entertain.

VI.

PELLEES ARE ENTITLED TO A DISMISSAL OF THIS ACTION UNDER THE ELEVENTH AMENDMENT TO THE CONSTITUTION.

The Eleventh Amendment to the Constitution ads:

> "The judicial power of the United States shall not be construed to any suit in law or equity, commenced or prosecuted against one of the

> United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

That appellant comes within the designation "citizen of another state" is clear, for it alleges that it is an Arizona corporation and corporations are included within the term "citizens". (See *Manchester Fire Ins. Co. v. Herriott,* C. C. (Iowa), 91 Fed. 711.)

While the State of California is not named as a defendant in the case, it is the real party in interest, for the defendants are named and sued in their capacity as state officials or employees. Throughout the complaint the acts complained of on the part of the appellees are alleged to be done as the Insurance Commissioner or his deputies.

The complaint, especially in so far as it seeks a money judgment, seeks that judgment against the appellees by reason of their official acts—acts alleged to be done as state officials. Such an action seeks judgment against the State of California, but the State has not consented to be sued in this type of action, as is clear from an examination of California statutes. Therefore a money judgment cannot be rendered against these appellees.

Moreover, if the action should be deemed against the appellees in their individual or personal capacity, action for a money judgment will still not lie.

Section 1955, Government Code of the State of California, reads:

> "If any officer, agent, or employee of the State, a district, county, political subdivision, or city

> acts in good faith and without malice under apparent authority of any law of the State, whether an initiative measure or an act enacted by the Legislature and the law subsequently is judicially declared to be unconstitutional as in conflict with the Constitution of the State or of the United States, he is not civilly liable in any action in which he would not have been liable if the law had not been declared unconstitutional, nor is he liable to any greater extent than he would have been if the law had not been declared unconstitutional."

This is an action which is based upon the theory that the appellee officers or employees of the State of California have acted under a statute, to-wit, the Insurance Code of the State of California, which statute is claimed to be unconstitutional. It is presently the type of action described in Section 1955 of the California Government Code. Under that section the appellees are granted immunity from liability. It is submitted, therefore, that appellant's action in this case, in seeking a money judgment, does not lie, whether the suit be deemed one against the appellees as representatives of the State of California or one against the appellees in their personal capacity.

Moreover, suits to restrain execution of State statutes will lie only when the act that one seeks to restrain is without the authority of the State law or provisions of statutes or Constitution of the United States. (*Worcester County Trust Co. v. Riley,* 302 U. S. 292.)

However, the statutes being enforced by appellees are so clearly constitutional that this case is in fact one against the State of California without its consent, in violation of the Eleventh Amendment to the Constitution of the United States, and, therefore, cannot be maintained.

CONCLUSION.

The judgment of the Court below dismissing the complaint should be affirmed.

Dated, San Francisco, California,
August 20, 1945.

Respectfully submitted,

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